

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE MIXON,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 249181

Wayne Circuit Court

LC No. 03-000883-01

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

MEMORANDUM.

Defendant appeals as of right his bench trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b)¹ (force), for which the trial court sentenced him to three years' probation. We affirm but remand for correction of the order of conviction and sentence and the sentencing information report.

Defendant contends that the trial court abused its discretion by allowing the victim, the victim's friend Auta Sanders, and police officers to testify about statements that the victim made about the alleged assault within approximately two hours after it occurred. We review the trial court's determination of evidentiary issues for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

The trial court ruled that the statements were admissible under the hearsay exception of excited utterance, MRE 803(2).² The two primary requirements for this exception are (1) there

¹ Both the order of conviction and sentence and the sentencing information report incorrectly indicate that defendant was convicted under MCL 750.520e(1)(a).

² Defendant also argues that the trial court erred in admitting this statement under MRE 801(d)(1)(B) as a prior consistent statement. But our review of the record reveals that this hearsay exemption was not raised before or ruled on by the trial court.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The facts must compellingly demonstrate that, when the statement was made, the declarant was still under a level of stress that would preclude the possibility of fabrication. *Id.* at 550-551.

Defendant argues that the victim was not under stress of the alleged assault when the statements were made. We disagree. After the assault, the victim called her friend Auta Sanders to pick her up. When Sanders arrived, the victim left the house with wet hair from which she had not yet rinsed conditioner. The victim was upset and crying as she described the assault to Sanders. The victim also tried calling her mother several times and called the police. Within two hours of the alleged assault, the victim described the assault to the police. At that time, the victim was still visibly upset. On this record, we conclude that the trial court did not abuse the “wide discretion” it has to determine that the victim was still under the stress of the assault when she made the statements at issue. *Smith, supra* at 552.

Affirmed but remanded for correction of the order of conviction and sentence and the sentencing information report. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood